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Admission and Presentation of Evidence in Germany

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I. INTRODUCTION

In the four years since the Berlin Wall fell, as the Communist regimes of Eastern Europe disintegrated one by one, opportunities for commercial relations in Central and Eastern Europe increased tremendously. This transition has also led to increased interest by U.S. companies in Germany as a location to do business, as Germany is perceived by many as a gateway to the burgeoning new markets of the East. Unfortunately, an increase in commercial relations leads to a corresponding increase in disputes and, consequently, litigation. Transnational disputes raise numerous legal issues concerning the procedures to be followed in foreign courts of law.

This Essay addresses the most relevant current issues regarding the admissibility and presentation of evidence that may arise in U.S.-German civil disputes heard before German courts.¹ First, this Essay will consider the choice of law rules that deter-

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1. For a general description of German-American transnational civil disputes, see generally PETER SCHLOSSER, *DER JUSTIZKONFLIKT ZWISCHEN DEN USA UND EUROPA* (1985); *DER JUSTIZKONFLIKT MIT DEN VEREINIGTEN STAATEN VON AMERIKA* [THE JURISDICTION CONFLICT WITH THE UNITED STATES OF AMERICA] (Walther Habscheid ed., 1986). For the most current and detailed analysis of evidentiary issues in German international law, see generally REINHOLD GEIMER, *PROZESSFÜHRUNG UND URTEILSANERKENNUNG IM AUSLAND* (1988); ROLF A. SCHÜTZE, *DEUTSCHES INTERNATIONALES ZIVILPROZESSRECHT* 80-84 (1985); DAGMAR COESTER-WALTJEN, *INTERNATIONALES BEWEISRECHT* (1983).

mine whether the German Code of Civil Procedure² applies. Next, this Essay will compare certain key features of the German law of evidence to the respective rules in the United States. Finally, this Essay will discuss three particularly important current issues of evidence law: (1) the proof of foreign substantive law before German courts; (2) the client-attorney privilege; and (3) the bank secret.

II. COMPARISON OF THE LAWS OF EVIDENCE

This section will discuss some of the main differences between American and German evidence laws.

A. General Principles

1. Party Disposition (*Verhandlungsmaxime*)

Under the principle of party disposition, parties litigating in German courts must offer all relevant factual allegations and all evidence on their own initiative (*Verhandlungsmaxime*).³ Contrary to a widely-held view among U.S. lawyers and scholars regarding the German legal system, the parties are solely responsible for introducing evidence in German litigation. The court will only hear evidence introduced by the parties and will not conduct its own investigations.⁴

2. Speedy Administration of Justice (*Beschleunigungsprinzip*)

This German procedure for the admission of evidence is in

2. Zivilprozessordnung [ZPO] (1993) (F.R.G.).

3. ZPO § 130. Pursuant to § 130, the parties must include in their pleadings the following:

.....
 2. the petitions that the party intends to submit when the court is in session;
 3. particulars of factual circumstances supporting the petitions;
 4. the declaration concerning the statements of facts of the opponent;
 5. the particulars of the evidence employed by the party for proving or rebutting statements of facts, as well as a declaration concerning the evidence indicated by the opponent.

Id., translated in THE CODE OF CIVIL PROCEDURE RULES OF THE FEDERAL REPUBLIC OF GERMANY OF JANUARY 30, 1877 AND THE INTRODUCTORY ACT FOR THE CODE OF CIVIL PROCEDURE RULES OF JANUARY 30, 1877 AS OF JANUARY 1988, at 35 (Simon L. Goren trans., 1990) [hereinafter CODE OF CIVIL PROCEDURE RULES].

4. This principle of party presentation of evidence in the adversary system is called *Verhandlungsgrundsatz*. See generally ZPO § 139 (stating the rule from which this principle may be inferred).

contrast with the procedure for filing a complaint in the United States. In the United States, a complaint includes a condensed narrative of the relevant facts—it is general, not specific. In contrast, in Germany, all evidence to be offered in the case must be included at this initial stage, including the names of all witnesses.⁵ Indeed, the parties have an obligation, under the principle of the speedy administration of justice (*Beschleunigungsgrundsatz*), to introduce facts and to identify witnesses and other means of evidence as promptly as possible. If the complaint does not name all the witnesses, the court may deny a party's request to later amend the complaint and add the missing witnesses if this would protract the case. Complaints may later be amended in response to the opposing party's brief if this does not delay litigation.⁶

The German procedure eliminates an important tactic that is basic to U.S. litigation—the element of surprise. Because all details must be revealed in the initial complaint, each side exposes all evidence in its favor at the outset of the case rather than later in the process, as in the U.S. court system. Nevertheless, this procedure may not be as revealing as it sounds. A party's obligation is one of truth; the parties must not deceive the court. Although the parties must name their witnesses in their briefs, they do not have to name all of them. The parties may decide to name only those witnesses whom they believe will be favorable to their case.⁷ A party is obligated to reveal all the evidence only if

5. ZPO § 130(5). For a translation of this Section, see *supra* note 3.

6. *Id.* § 282(1). Section 282(1) provides:

(1) Each party shall present at the oral hearing its means of attack and of defense, especially allegations, denials, pleas, objections, evidence and objections to evidence, in such a timely manner as in the state of the case it would be in accordance with a careful conduct of proceedings calculated to expedite the legal process.

Id., translated in CODE OF CIVIL PROCEDURE RULES, *supra* note 3, at 72.

7. ZPO § 138. Section 138 provides:

(1) The declarations given by the parties concerning factual circumstances shall be complete and truthful.

(2) Each party shall answer facts asserted by the opponent.

(3) Facts which are not expressly denied shall be deemed as admitted, unless the intention to deny them is manifest in the other declarations of the party.

(4) A declaration of lack of knowledge concerning facts is permissible only concerning facts which were not personally dealt with by the party or subject of his concern.

Id., translated in CODE OF CIVIL PROCEDURE RULES, *supra* note 3, at 37.

the authorities are in dispute; otherwise, the party would violate the obligation of truth (*Verpflichtung zur Wahrheit*).⁸

3. Free Evaluation of Evidence (*freie Beweiswürdigung*)

German evidentiary proceedings are governed by the principle of free evaluation of the evidence.⁹ With a few statutory exceptions, both the admission and weighing of evidence are within the discretion of the court.¹⁰

In accordance with the principle of free evaluation of the evidence, German courts do not follow certain evidentiary rules adhered to by courts in the United States.¹¹ For example, hearsay is admissible in German courts, and it is up to the court to determine whether or not the evidence is convincing.¹² Additionally, rules such as the "opinion rule," precluding conclusory factual statements by lay witnesses, and the "best evidence rule," requiring original documentation to prove the contents of a writing, do not apply in German courts.¹³ These differences from the U.S. system, where the jury is the trier of fact, can be attributed to the absence of a jury system in German civil procedure. When a jury hears the facts of a case, more protection is required than in a system controlled by professional jurists.

8. *Id.*

9. ZPO § 286. Section 286 states:

(1) The court shall decide at its free discretion, by taking into account the whole substance of the proceedings and the results of any evidence taking, whether a factual allegation should be regarded as true or untrue. . . .

(2) The legal rules of evidence are binding on the court only in the cases indicated throughout this Act.

Id., translated in CODE OF CIVIL PROCEDURE RULES, *supra* note 3, at 73.

10. For instance, as to evidence located in, and taken from, foreign countries, the rules set forth in the Hague Convention on the Taking of Evidence Abroad govern. Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, Mar. 18, 1970, Bundesgesetzblatt, Teil II [BGBl. II] 1472 (1977).

11. In the United States, federal courts follow the Federal Rules of Evidence, and state courts follow either the evidence codes enacted within the state or the common law rules of evidence. Although there is no rule that governs in every jurisdiction, certain rules are generally accepted. For example, hearsay is considered to be inadmissible in U.S. courts unless it falls within one of the exceptions to the hearsay rule. References to rules of evidence in the United States will be to the widely accepted principles of evidence, except where otherwise noted.

12. ZPO § 286. For a translation of this Section, see *supra* note 9.

13. *Id.*

4. Substantive Duties to Produce Evidence

German civil procedure does not impose a general duty on behalf of either party to produce evidence in favor of the other.¹⁴ A German court may impose this duty on the parties only if it is so directed by a substantive statute. In other words, such duties in German law are restricted to preexisting legal relationships, like those created by contractual agreements.¹⁵ This strict interpretation has recently been reconfirmed by the German Federal Supreme Court.¹⁶

This concept may be illustrated by an example drawn from partnership law. A member of a partnership¹⁷ (*bürgerlichrechtliche Gesellschaft*) who is not in possession of partnership documents and financial statements, but wishes to sue the partnership for his profit share, cannot simply sue the partnership and "discover" company documents in the course of the litigation. Instead, partnership law gives every member a substantive right to inspect company documents.¹⁸ Therefore, the partner must first sue the company for access to company records, and then subsequently sue for the profits derived from those documents. Thus, there is a two-tier substantive approach, first for documents, and then for the financial or other remedy derived from the documents. These claims may be combined in one single lawsuit (two-tier complaint, *Stufenklage*), but they do constitute two actions for two separate, substantive remedies.

An attorney litigating before a U.S. court has the limited responsibility of presenting one side of a factual or legal issue that a tribunal will consider in reaching its decision; the opposing position is expected to be presented by the other party.¹⁹ In an *ex parte* proceeding, however, a lawyer must inform the tribunal

14. In some cases, parties may be compelled to reveal evidence, favorable or unfavorable. See text accompanying *supra* note 8.

15. These relationships are called *bestehende Rechtsverhältnisse*.

16. Judgment of June 11, 1990, 12 JURISTEN ZEITUNG [JZ] 630 (1991); Peter Schlosser, *Die lange deutsche Reise in die prozessuale Moderne*, 12 JZ 599 (1991).

17. BÜRGERLICHES GESETZBUCH [BGB] §§ 705 *et seq.* (F.R.G.).

18. *Id.* § 716.

19. MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.3 cmt. 15 (1983), *reprinted in* PROFESSIONAL RESPONSIBILITY 67 (Thomas D. Morgan & Ronald D. Rotunda eds., 1992). Additionally, lawyers practicing before U.S. courts must disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of his or her client and not disclosed by opposing counsel. *Id.* at 63.

of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.²⁰

B. Types of Evidence Permitted

German courts will admit the following types of evidence in civil proceedings: visual inspection by the court, witness testimony, production of documents, examination of the parties, and expert evidence.

1. Visual Inspection by the Court (*Augenschein*)

Either of the parties or the court, on its own initiative, may propose inspection.²¹

The inspection is to provide the court with an immediate impression of the physical properties and qualities and the state of persons or things or with a personal perception of processes. The inspection is not limited to the visible, but comprises also the audible and palpable perception and the senses of smell and taste.²²

Judges often rely on experts in addition to their own perceptions; however, the inspected person or the owner of the goods or processes inspected must consent for such evidence to be admissible.²³

2. Witness Testimony (*Zeugbeweis*)

Witnesses who are not parties to the action may be called to testify about facts observed, but not to give opinions.²⁴ After the court concludes its questioning of a witness, the parties and their attorneys may examine the witness.²⁵ There is, however, no direct or cross-examination; rather, the judges "play an active role" in this examination, and the court's judgment on the admissibility of questions is final.²⁶ Additionally, witnesses are entitled to

20. *Id.* at 64.

21. *See generally* ZPO §§ 371-72a.

22. Hartwig Graf von Westerholt & Peter Lautz, *Litigation in Civil Courts*, in 1 BUSINESS TRANSACTIONS IN GERMANY 5-38.3 (Dennis Campbell et al. eds., 1993).

23. *Id.* at 5-38.1.

24. *Id.* *See generally* ZPO §§ 373-401.

25. ZPO § 397.

26. von Westerholt & Lautz, *supra* note 22, at 5-38.2. While the presiding judge's "active role" in examining witnesses is self-evident to the German lawyer and, in fact, to

compensation covering lost income and reasonably incurred expenses.²⁷

3. Production of Documents (*Urkundsbeweis*)

Parties commonly substantiate their allegations by submitting documents, usually in the form of a copy.²⁸ While the German Code of Civil Procedure (*Zivilprozessordnung*) only considers originals or certified copies of documents to be ultimately persuasive, the production of originals will be ordered by the court only if the authenticity of the copy is challenged by the opposing party. If a party in its brief refers to documents alleged to be in its possession, the opposing party will usually contest the allegation and thereby force the other party to produce the document. The court also has the discretion to order such a party to produce the document in court. Only documents within the parties' control or those that may legally be obtained from third parties are admissible.²⁹

German rules of evidence severely restrict the production of documents through their grant of broad discretion to the trial judge. The probative value of documents may be limited and must be considered separately in each issue. Nevertheless, the Court's power does not extend to include documents in the possession of third parties. Consequently, the party bearing the burden of proof must file an action for the production of documents against the third party; this procedure is often time-consuming.³⁰ Thus, German courts, as an alternative to an action for the production of documents, may admit secondary evidence.³¹

the citizen, so that it does not need to be reiterated in the Code, it does follow, indirectly, from subsection (3) of Section 396.

Section 396(3) provides: "Upon request the presiding judge has to allow any other member of the court to ask questions."

27. *Id.* See also ZPO § 401.

28. The production of documents is generally governed by Sections 415-44 of the ZPO.

29. von Westerholt & Lautz, *supra* note 22, at 5-38.2.

30. Schlosser, *supra* note 16, at 603.

31. Secondary evidence may include witness testimony and other circumstantial evidence. For example, if the parties are unable to locate a document, but someone remembers that there was such a document and can state its contents, that person may testify as to the contents of the document. This provision is based upon the principle of free evaluation of the evidence. ZPO § 286. See translation of § 286, *supra* note 9.

"The obstruction of documentary evidence entitles the court to consider the alleged contents of the document as proven."³² Even though the Code of Civil Procedure uses the term "court order,"³³ one must not be mistaken about the quality of such an order. A party not following a court order to produce documents will not be held in contempt. Instead, the sanction remains a purely evidentiary one. If the court orders a party to produce a document referred to in one of its briefs and the party refuses, the factual version presented by the other party will simply be taken as proven.³⁴

4. Expert Testimony (*Sachverständigenbeweis*)

While testimony by experts is generally subject to the same rules as witness testimony,³⁵ a number of special rules apply. Contrary to U.S. practice, the parties do not nominate their own expert witnesses but designate the factual allegations to be submitted to an expert.³⁶ The selection and appointment of the expert is the responsibility of the court. In practice, the court usually proposes the appointment of a particular expert, or obtains the name of an expert from a public institution (such as Chambers of Commerce), and then asks the parties for their comment and consent.

Most expert opinions are submitted to the court in writing. If necessary, the court will call the expert into the court for a hearing to investigate specific aspects of the expert's opinion.

Even though this system leaves the basic principle of party disposition intact, the active role of the court once again demonstrates the more integrated evidentiary proceeding before the German courts, allocating more responsibility and initiative to the court than does the U.S. system.

32. *Id.*

33. ZPO § 427.

34. von Westerholt & Lautz, *supra* note 22, at 5-38.2.

35. ZPO §§ 402-15.

36. ZPO § 403.

5. Examination of the Parties (*Parteivernehmung*)

German law limits the extent to which parties are subject to examination by the court.³⁷ Section 445 of the German Code of Civil Procedure provides:

- (1) A party who failed to fully present the evidence incumbent upon him by other means of evidence or failed to offer other means of evidence may offer evidence by making a petition for the examination of the opponent concerning facts to be proved.
- (2) The petition shall not be allowed if it concerns facts, the opposite of which are considered by the court as established.³⁸

In effect, this provision is the same as having the parties themselves testify; nonetheless, it is regarded as separate because of the parties' partisan positions. The parties' testimony may be heard in cases where there is conflicting testimonial evidence or where a party does not have any witnesses, such as in contract disputes with no written memorialization.

Judges usually hesitate to rely solely on the parties' testimony because they deem such testimony to be biased. Nevertheless, the application of the Code of Civil Procedure is open to interpretation in terms of its application. Thus, the court has discretion to determine whether or not a party has presented sufficient evidence. In practice, the parties will often be heard. Although it is permissible under the Code, a court will not usually refuse to hear a party on the grounds that the party could have offered other means of evidence due to the risk that the case will be overturned for failure to take sufficient evidence.

C. Discovery

In addition to Germany's lack of a jury system, Germany and the United States differ significantly with regard to their methods of civil pretrial discovery.³⁹ For example, German civil procedure precludes the production of evidence merely to obtain additional evidence.⁴⁰

37. See ZPO §§ 445-55.

38. ZPO § 445, translated in CODE OF CIVIL PROCEDURE RULES, *supra* note 3, at 109.

39. This Essay does not address issues of the Hague treaty on production of evidence abroad, frequently discussed under the heading *Deutsch-Amerikanischer Justizkonflikt*.

40. This is called *Verbot des Ausforschungsbeweises*. Egbert Peters, *Die Verwertung rechtswidrig erlangter Beweise und Beweismittel im Zivilprozess*, 76 ZEITSCHRIFT FÜR ZIVILPROZESSRECHT [ZZP] 145 (1983); ROLF STÜRNER, DIE AUFKLÄRUNGSPFLICHT DER

Additionally, in contrast to discovery procedures in the United States, German discovery procedures are not codified. Rather, German discovery involves different strategies that perform some of the same functions as the U.S. pretrial discovery procedures for obtaining evidence both in and out of court. For example, an attorney filing a civil case might want to involve criminal authorities because prosecutors can seize documents to which the civil attorney can later gain access. Another example is an independent evidentiary proceeding where, if it is possible that evidence may be destroyed, a court inspector can be appointed to prepare a report that is not completely limited to the particular legal issue.⁴¹ Additionally, attorneys can solicit information from the opposing side in their briefs by being specific or even by speculating, so that the opposing side must contest the claims.

An interesting new discovery feature was introduced into the new Environmental Liability Act (*Umwelthaftungsgesetz*), which entered into effect in 1991. This Act gives an aggrieved party a right to request information from the operator of the installation alleged to have caused harm.⁴² This is a claim for information and not for the production of documents, but there is a right to inspect records if the plaintiff has reason to believe that the information is incomplete or insufficient.⁴³

Despite these discovery procedures, the German means are limited compared to the abounding methods to obtain evidence in a U.S.-style pretrial discovery. It is not uncommon in an on-going proceeding for parties, wishing to litigate or needing additional evidence, to retain a detective agency, particularly to sort through discarded evidence, observe individuals or interrogate potential witnesses that otherwise could not be controlled.

III. LAW APPLICABLE TO EVIDENTIARY ISSUES

German courts distinguish between choice of law in the areas of civil procedure (*Internationales Zivilprozessrecht*) and substantive civil law (*Internationales Privatrecht*).⁴⁴ German procedural

PARTEIEN IM ZIVILPROZESS 108-10 (1978).

41. See ZPO §§ 485-94a.

42. *Umwelthaftungsgesetz* [Environmental Liability Law], Dec. 10, 1990, Bundesgesetzblatt, Teil I [BGBl.I], § 8 (1990).

43. *Id.* § 8(3).

44. Contrary to the law of the United States, however, the ZPO has no equivalent state-level conflict of law rules. Additionally, the areas of civil law, commercial law, and

choice of law rules are largely uncoded. In contrast, choice of law rules regarding substantive civil law, for the most part, have been codified in the Introductory Law to the Civil Code.⁴⁵ Generally, German courts will apply the German Code of Civil Procedure (*lex fori*) instead of foreign procedural law.⁴⁶ As in U.S. law, however, substantive conflict of law (*lex causae*) principles govern certain areas of evidence law.

A. Procedural Issues

Because issues of procedure are usually governed by the law of the jurisdiction where the court sits, the German Code of Civil Procedure governs issues of admissibility and evaluation of evidence.

B. Substantive Issues

German choice of law rules determine which law governs substantive issues before German courts. Of course, the conflict of law rules applicable to the respective issues govern the admissibility of evidence (*Beweisthema*), including statutory presumptions.⁴⁷ Furthermore, the underlying substantive law determines which party bears the burden of proof.⁴⁸ For example, if a party is late in performing his obligations under a contract, giving rise to a cause of action, there is a presumption that the late party is at fault. Thus, the plaintiff must only show that the defendant is late for the burden to shift to the defendant to show that he is not at fault.⁴⁹

German choice of law doctrine characterizes two issues as substantive that would be treated as procedural under U.S. choice of law rules: the admission of evidence and the statute of limitations. With regard to the admission of evidence, although the Code of Civil Procedure does not expressly provide guidance in

corporate law are governed exclusively by federal law. Therefore, the distinction between procedure and substance is purely an issue of international civil procedural law.

45. EINFÜHRUNGSGESETZ ZUM BÜRGERLICHEN GESETZBUCH [EGBGB] (1896), amended by Gesetz zur Neuregelung des Internationalen Privatrechts, Bundesgesetzblatt, Teil I [BGB1. I] 1142 (1986).

46. HAIMO SCHACK, INTERNATIONALES ZIVILVERFAHRENSRECHT 14-16 (1991); Wolfgang Grunsky, 89 *Zeitschrift für den Zivilprozess* 241-59 (1976).

47. SCHACK, *supra* note 46, at 245-46; SCHÜTZE, *supra* note 1, at 248-49.

48. EGBGB, *supra* note 45, art. 32(3).

49. BGB, *supra* note 17, § 285.

this area, the substantive choice of law rules permit a German court to apply substantive foreign evidentiary law if the conflict pertains to an issue of form.⁵⁰ Such an issue arises when substantive law requires a document to take a certain form, such as when the Statute of Frauds requires a document to be in writing. The German treatment of the statute of limitations as a substantive issue generally follows from the EGBGB⁵¹ and the Civil Code.⁵² Thus, German law in general treats this issue as substantive.

C. *Consequences of the Substance-Procedure Distinction Before German Courts*

Based on their characterization of substantive and procedural issues, German courts may apply certain U.S. evidentiary rules. For example, in a situation involving the Statute of Frauds, the German court will consider Section 2-201 of the Uniform Commercial Code, requiring a contract to be made in writing, as substantive law and will apply it. In other cases where the Statute of Frauds is not an issue, the court will consider and apply the Parol Evidence Rule⁵³ as substantive law.

The distinction between procedural and substantive issues may trap the unwary. For example, German law characterizes some issues, such as the statute of limitations and the doctrine of setoff, as substantive.⁵⁴ If a German court applies a U.S. statute of limitations or its rule allowing setoff, the scope of application would extend to both procedural and substantive laws. U.S. law, however, characterizes these issues as procedural. The German court considers this a *renvoi*⁵⁵ to its *lex fori* and would apply German substantive law.⁵⁶ Thus, as a general rule, German

50. EGBGB, *supra* note 45, art. 11; SCHACK, *supra* note 46, at 244-48.

51. EGBGB, *supra* note 45, art. 11. Number 4 of subsection 1 of this article states that the substantive law governing the contract also determines whether an obligation is time-barred. *Id.* art. 32(1).

52. EGBGB, *supra* note 45, §§ 194-225.

53. COESTER-WALTJEN, *supra* note 1, at 377-79. See also U.C.C. § 2-202 (1990) (stating the provisions of the parol evidence rule).

54. See EGBGB, *supra* note 45, art. 32(1).

55. "The 'doctrine of *renvoi*' is a doctrine under which [a] court in resorting to foreign law adopts rules of foreign law as to conflict of laws, which rules may in turn refer [the] court back to [the] law of [the] forum." BLACK'S LAW DICTIONARY 1298 (6th ed. 1990).

56. This, perhaps unexpected, result has been called *Versteckte Rückverweisung*, or hidden *renvoi*. The German courts thus try to avoid difficulties that may arise once a foreign choice of law rule is not part of the substantive body of foreign law, but of foreign procedure. The use of hidden *renvoi* has regularly been the case in the U.S.-German

substantive law governs procedural issues such as the statute of limitations or setoff.

Difficult conflict of law issues may also arise from the differences in the parties' obligations to produce documents. The issue of whether German statutory provisions determine a party's obligation to produce documents depends entirely on the substantive choice of law rules. Thus, if the applicable foreign law deems the duty to produce documents as procedural, it is not clear whether a German court would apply the foreign procedural law as substantive law under German conflict rules.⁵⁷ The result may be unequal treatment of German and U.S. parties.

IV. SELECTED ISSUES

The following three issues, of particular interest to attorneys involved in U.S.-German civil litigation, are handled differently in Germany and the United States: the proof of foreign law before a German court; the client-attorney privilege; and bank secrecy under the Code of Civil Procedure.

A. Proof of Foreign Substantive Law

Generally, after a German court admits evidence in the evidentiary proceedings, the court must find the applicable law (*iura novit curia*). In a transnational setting, choice of law rules may compel a German court to apply foreign substantive law.

setting, because once jurisdiction is established, U.S. courts may apply the substantive law of the forum. EUGENE SCOLES & PETER HAY, *CONFLICT OF LAWS* 475 (1982); *RESTATEMENT CONFLICT OF LAWS* 2d § 285.

In the case of an ordinary *renvoi*, once a German choice of law rule dictates that a legal issue should be governed by U.S. law, the whole body of U.S. substantive law and U.S. state choice of law becomes applicable. EGBGB, *supra* note 45, art. 4(1)(3). If the applicable U.S. choice of law rule refers to German law, the German choice of law rules finally accept the *renvoi*. *Id.* art. 4(1).

Nevertheless, if the U.S. choice of law rule is not part of the substantive body of rules referred to by article 4(1) of the EGBGB, but is procedural, there will be no *renvoi* because German courts will only apply the German *lex fori*. In order to coordinate the results of German choice of law referring to the United States and U.S. procedural law referring to the forum state (Germany), German courts will apply German substantive law. The *Versteckte Rückverweisung* technically is not a *renvoi*, but a kind of international adaptation. The *renvoi* has been said to be "hidden" because the final choice of law decision is hidden in a foreign procedural rule. GERHARD KEGEL, *INTERNATIONALES PRIVATRECHT* 252-53 (1987); HELDRICH (ed.), *Palandt Kommentar zum Bürgerlichen Gesetzbuch*, EGBGB, 2186 n.1(b).

57. For a discussion of the substance-procedure distinction before German courts, see *infra* text accompanying notes 54-57.

Therefore, the issue is whether the principle of *iura novit curia* also governs the proof of foreign law. If it does not, the court does not have to find the law. Rather, the parties carry the burden of proving which law the court must apply.

There are two approaches for resolving proof of foreign law issues. The first approach, that of the common law, characterizes proof of foreign law as a factual issue and, therefore, places the burden of proof on the parties. The second approach, that of the civil law, characterizes foreign law as an issue of law, subject to the court's investigation. Nevertheless, similar to the situation in the United States, current German doctrine and practice abandon a puristic attitude and favor cooperation between the court and the parties.⁵⁸

Although the Code of Civil Procedure is ambiguous on the issue,⁵⁹ German courts have the duty to determine the applicable foreign law.⁶⁰ In many cases, however, considerable problems impede the court's determination. German courts apply the rules governing the taking of evidence to ascertain the pertinent information. The courts regularly require an advance payment by the parties to cover the costs incurred in finding this information; however, foreign parties should oppose such demands.⁶¹

58. See FED. R. CIV. P. 44.1. German parties before U.S. courts should present to the court any legal source and material available in order to comply with a purely factual approach. U.S. parties before German courts should also follow this practice.

59. ZPO § 293. Section 293 states:

Laws of another state, customary law and by-laws require proof only to such extent as they are unknown to the court. In the ascertainment of these legal norms, the court is not limited to the evidence offered by the parties; it is empowered to make use of other sources of knowledge and to direct whatever is necessary for the purpose of such utilization.

Id., translated in CODE OF CIVIL PROCEDURE RULES, *supra* note 3, at 74.

60. Judgment of Feb. 21, 1962, 36 Entscheidungen des Bundesgerichtshofes in Zivilsachen [BGHZ] 348 (1962); Judgment of Sept. 22, 1971, 57 BGHZ 72 (1971). 29 NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 1581 (1976); 3 Recht der Internationalen Wirtschaft [RIW] 199 (1982); Werner Geisler, *Zur Ermittlung ausländischen Rechts durch Beweis im Prozess*, 91 ZZZ 176-79 (1978).

61. The principle of *iura novit curia* governs the proof of foreign law. Additionally, a foreign party may rely on the restrictive interpretation of Section 110 of the ZPO regarding advances on legal fees required by foreign parties that may not be required in a U.S.-German setting. Section 110 provides:

(1) Nationals of foreign states who appear as plaintiffs shall give the defendant security for the costs of the lawsuit if he so demands. The same is valid for stateless persons who are not residents of the country.

(2) This obligation does not arise:

1. if, under the laws of the state of which the plaintiff is a national, a German would not be required to give security in an identical case;

Today, most expert opinions are delivered by the well-known Institutes for Conflict of Laws ("IPR-Institute").⁶² These Institutes deliver thorough information regarding the applicable foreign law at issue. The directors are considered experts in the field and may testify before the court on foreign law issues. The Institutes are not governmental agencies; rather, they serve a function similar to that of a court-appointed witness. As an administrative matter, the court will ask the Institutes for their opinion on the applicable law.

The amount of work and time needed for these investigations burdens the German legal system. Therefore, in certain proceedings, German courts will regard party-appointed expert opinions⁶³ and translations of other relevant materials as sufficient to determine the applicable foreign law. Thus, in practice, foreign law is determined in a manner similar to that in the United States.

Recently, however, the Federal Supreme Court of Germany limited reliance on standard inquiries to the IPR-Institutes to fulfill the proof requirements for foreign law.⁶⁴ The Court decided that lower courts may not merely address one of the Institutes, but must also initiate further inquiries.⁶⁵ For example, if a foreign law is not clear, it is not sufficient for the court to limit its inquiry to examining the foreign law itself. In addition to inquiring into the facial requirements of the law, the court must also examine the practice of the courts in the foreign jurisdiction that may require the testimony of a practitioner or other qualified witness as to the application of the law in practice.

2. in proceedings of a trial by record or summary proceedings;

3. in case of counterclaim;

4. in claims made as the result of a public notice;

5. in case of claims arising from rights registered in the Land Register.

ZPO § 110, translated in CODE OF CIVIL PROCEDURE RULES, *supra* note 3, at 28.

62. These Institutes include: Institut für ausländisches und internationales Privatrecht der Universität Freiburg/Bsg.; Abteilung für internationales und ausländisches Privatrecht des Juristischen Seminars der Universität Göttingen; Max-Planck-Institut für ausländisches und internationales Privatrecht, Hamburg; Institut für internationales und ausländisches Recht der Universität Köln; Institut für internationales Recht der Universität München.

There is a European agreement on the acquisition of information regarding foreign laws; however, this agreement proved relatively ineffective because of its very general scope. See European Convention on Information on Foreign Law, Dec. 17, 1969, 2 EUROPEAN CONVENTIONS AND AGREEMENTS 351 (1972).

63. Such opinions are obtained from well-respected attorneys or professors whom the parties name in their complaints.

64. Judgment of Jan. 21, 1991, 37 RIW 514-16 (1991).

65. *Id.* at 514; Judgment of May 8, 1992, 38 RIW 673 (1992).

The Federal Supreme Court also held that the IPR-Institutes' general opinions that do not consider the current practice within the foreign jurisdiction do not satisfy proof requirements for determining the appropriate foreign law.⁶⁶ Given the volume of work already taken on by these Institutes, it is unclear whether courts will admit the parties' presentations on the applicable foreign law more frequently than they have in the past.

Two major consequences should be noted. First, the foreign parties may not suffer prejudice solely because the foreign law is not provable. The case is not thrown out even if the foreign law cannot be proven. The court must exhaust all other means of evidence, including testimonies of practitioners and officials, to establish the foreign law.⁶⁷ In some cases, German courts may look to the laws of a third state to establish the applicable foreign law. For example, if two countries have similar political and social systems, as well as similar legal systems, a German court may look to the law of one of these countries to determine the law of the other. The court cannot deny justice merely because the law cannot be proven. Second, opinions of the IPR-Institute experts may be attacked by opposing parties for failing to satisfy the high standards set forth by the Federal Supreme Court.

B. Client-Attorney Privilege

According to German procedural choice of law rules, the German *lex fori* governs the issue of privileges.⁶⁸ The Code of Civil Procedure generally acknowledges the right to refuse to offer evidence in certain situations, such as family relations or conflicts of interest arising out of professional responsibility.⁶⁹ In such cases, if the witness submits a written declaration to the court prior to the hearing and the court grants the privilege,⁷⁰ the witness may refuse to testify.

The client-attorney privilege has been explicitly codified.⁷¹

66. Judgment of Jan. 21, 1991, *supra* note 64, at 515.

67. *Id.*

68. Because civil procedure in Germany is governed exclusively by federal law, no issues of conflicting domestic state law privileges arise.

69. ZPO §§ 383, 384.

70. *Id.* §§ 386, 397.

71. *Id.* § 383(1)6. Section 383(1)6 provides that persons are not required to testify if they are those "to whom matters are entrusted by virtue of their office, profession or trade, which are to be kept secret due to their nature or by law, with respect to the facts

Thus, an attorney may refuse to testify about any facts or circumstances that came to her knowledge during the client-attorney relationship.⁷² The privilege survives the contractual relationship between the attorney and the client and does not require an express or implied statement of confidentiality.⁷³ The privilege covers domestic and foreign attorneys,⁷⁴ as well as in-house counsel acting on a permanent basis.⁷⁵ The privilege may, however, be waived by the client. If the client authorizes disclosure, the attorney must testify.

C. Bank Secrecy

The bank secret is based on the contractual or quasi-contractual relationship between the bank and its customer. Although it has not been expressly enacted, bank secrecy is protected before German courts under the same provision as the client-attorney privilege.⁷⁶ The privilege extends to all factual information that an ordinary customer would expect to remain confidential.⁷⁷ Thus, bank secrecy protects all information regarding the customer's bank accounts and business activities.⁷⁸

to which the duty of secrecy pertains." *Id.*, translated in CODE OF CIVIL PROCEDURE RULES, *supra* note 3, at 97. This Section is reinforced by the existence of a penal code provision on the breach of confidentiality. See Strafgesetzbuch [StGB] § 203(I)(3).

72. 2.2 KOMMENTAR ZUR ZIVILPROZESSORDNUNG §§ 303-510(b) at § 383 n.90 (Friedrich Stein et al. eds., 20th ed. 1989); ZIVILPROZESSORDNUNG § 383 n.3 (Adolf Baumbach et al. eds., 49th ed. 1991); JÜRGEN DAMRAU, 2 MÜNCHENER KOMMENTAR ZUR ZIVILPROZESSORDNUNG §§ 355-802 at § 383 n.2 (Lüke & Walchshöfer eds., 1992).

73. Judgment of July 4, 1984, 91 BGHZ 392, 397 (1984); 37 NJW 2893-94 (1984); DAMRAU, *supra* note 72, § 383 n.87.

74. STEIN, *supra* note 72, § 383 n.87.

75. For a merger and acquisitions case, see Judgment of Nov. 3, 1981, Landgericht Frankfurt 32. *Anwaltsblatt* (AnwBl.) 197-98 (1982); Judgment of May 5, 1969, Oberlandesgericht Bamberg, 23 *Monatsschrift für Deutsches Recht* [MDR] 768 (1969).

76. ZPO § 383(1)6. For a translation of this Section, see *supra* note 71.

77. CLAUD-WILHELM CANARIS, 1 BANKVERTRAGSRECHT 57 n.63 (3d ed. 1988); KARL STICHMAN, BANKGEHEIMNIS UND BANKAUSKUNFT IN DER BUNDESREPUBLIK DEUTSCHLAND SOWIE IN WICHTIGEN AUSLÄNDISCHEN STAATEN 215-16 (S. Feuerborn et al. eds., 3d ed. 1984); DAMRAU, *supra* note 72, § 383 n.39; STEIN, *supra* note 72, § 383 n.87. The privilege has been reinforced by Council Directive 77/780, 1977 O.J. (L 322) 30, on banking activities within the European Community. See European Court of Justice, Dec. 11, 1985, 110/84, WERTPAPIERMITTEILUNGEN [WM] 877 (1986).

78. There are restrictions in enforcement proceedings according to Section 840 of the ZPO, and in injunction proceedings according to Sections 916 and 930 of the ZPO. The latter exception does not seem conclusive. In any event, bringing a massive injunctive proceeding against a variety of banks in order to explore the banking relationships of the adverse party is deemed illicit (*Ausforschung*). Judgment of Mar. 13, 1981, 80 BGHZ 172,

The bank secrecy privilege provided by German law does not exist in federal courts in the United States.⁷⁹ While the attorney-client privilege may prevent a U.S. attorney from revealing the name of a client who has withdrawn funds from a bank, the bank is not always privileged to protect that information. For example, in *United States v. Bisceglia*,⁸⁰ a bank received two large cash deposits under suspicious circumstances. The Court issued a summons ordering the bank to provide records revealing the name of the person or persons who deposited the money with the bank.⁸¹

The Code of Civil Procedure allows a client to waive the client-attorney or bank secrecy privileges.⁸² It must be emphasized, however, that only the client retains this power. If the right to offer evidence is not granted by the client, the court usually cannot draw any conclusions adverse to the party at trial.⁸³

In various cases involving German and U.S. parties, U.S. courts have failed to recognize the privilege of bank secrecy provided by German law.⁸⁴ For these courts, it made no difference whether a subpoena ordered in pretrial discovery affected bank accounts in the United States or in Germany. Consequently, the German bank secret may not provide a basis for refusal of testimony before a U.S. court.

V. CONCLUSION

Civil litigation in Germany is drastically different from that in the United States. This difference is particularly prevalent in the area of presentation and admissibility of evidence. While in a U.S.

181 (1981).

79. *United States v. Nelson*, 486 F.Supp. 464 (W.D. Mich. 1980).

80. 420 U.S. 141 (1975).

81. *Id.* at 143-44. A bank's obligation to reveal information, however, may be limited to cases involving tax fraud investigations. The *Bisceglia* decision was based on the duty of the Internal Revenue Service to investigate possible violations of the tax laws pursuant to the Internal Revenue Code. *Id.* at 145-46, 148.

82. "The persons indicated in § 383 nos. 4 and 6 may not refuse to give evidence if they are released from the duty of secrecy." ZPO § 385(2).

83. Nevertheless, a German court drew such negative conclusions. Judgment of Jan. 7, 1981, 1981 ZEITSCHRIFT FÜR WIRTSCHAFTSRECHT [ZIP] 1323. This decision, however, has not been followed and has been rejected by major authorities in the field. CANARIS, *supra* note 77, at 44 n.43.

84. See *United States v. First Nat'l City Bank (Citibank)*, 396 F.2d 897 (2d Cir. 1968); *The Krupp Case*, 22 I.L.M. 740 (1983). For the protective order issued by a German court, see 6 RIW 206 (1983).

setting the litigation lies in the hands of the parties and their attorneys, German law provides for an integrated procedure in which the court plays a much more active role than in the United States. The absence of pretrial discovery and juries in Germany is notorious and accounts for many other differences in the litigation system.

On a more technical note, U.S.-German litigation also requires a thorough analysis of the dividing line between substantive and procedural law. While in principle every court applies its own procedural law, and the substantive law to which choice of law directs the judge, certain evidentiary rules may be considered procedural in one jurisdiction and substantive in another jurisdiction. Careful analysis of the issue at hand may avoid surprises.

In spite of fundamental philosophical differences in both countries' court systems, trade and economic cooperation will continue to be driven primarily by economic and less by legal factors. Lawyers familiar with the differences in the two systems will be able to guide international investors and litigants through the legal pitfalls that come with the internationalization of trade and investment.

